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No. 93-860

IN THE
# *Supreme Court of the United States*
October Term, 1993

SHIRLEY IVY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DONALD IVY, DECEASED; ET AL.,
*Petitioners,*

*v.*

DIAMOND SHAMROCK CHEMICALS COMPANY; ET AL.,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF *AMICI CURIAE* OF AGENT ORANGE COORDINATING COUNCIL; THE AMERICAN LEGION; VETERANS OF FOREIGN WARS OF THE U.S.; DISABLED AMERICAN VETERANS; AMVETS; JEWISH WAR VETERANS OF THE USA; RETIRED ENLISTED ASSOC.; VIETNAM VETERANS OF AMERICA; MARINE CORPS LEAGUE; CATHOLIC WAR VETERANS, USA, INC.; AMERICAN EX-PRISONERS OF WAR; BLINDED VETERANS ASSOC.; MILITARY ORDER OF THE PURPLE HEART OF THE USA, INC.; ARMY AND NAVY UNION, USA; POLISH LEGION OF AMERICAN VETERANS, USA; PARALYZED VETERANS OF AMERICA; REGULAR VETERANS ASSOC. OF THE U.S.; ITALIAN AMERICAN WAR VETERANS OF THE USA; WOMEN'S ARMY CORPS VETERANS ASSOC.; AMERICAN WAR MOTHERS; LEGION OF VALOR OF THE USA, INC.; CONGRESSIONAL MEDAL OF HONOR SOCIETY; THE RETIRED OFFICERS ASSOC.; NATIONAL VIETNAM VETERANS COALITION; FLEET RESERVE ASSOC.; THE VETERANS OF THE VIETNAM WAR, INC.; NATIONAL ASSOC. OF MILITARY WIDOWS; NEW JERSEY AGENT ORANGE COMMISSION; OKLAHOMA AGENT ORANGE FOUNDATION; AGENT ORANGE DATA BASE; AND THE AGENT ORANGE VICTIMS AND WIDOWS SUPPORT NETWORK, IN SUPPORT OF CERTIORARI**

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## TABLE OF CONTENTS

STATEMENT OF INTEREST . . . . . 1

SUMMARY OF THE ARGUMENT . . . . . 4

ARGUMENT

I. FUTURE CLAIMANTS HAD NO NOTICE THAT THEIR CLAIMS WERE BEING EXTINGUISHED . . . . 7

II. FUTURE CLAIMANTS DID NOT RECEIVE ADEQUATE REPRESENTATION DURING THE SETTLEMENT PROCESS . . . . . 10

III. PURPORTED JUDICIAL EFFICIENCY CAN NEVER JUSTIFY THE WHOLESALE DENIAL OF DUE PROCESS RIGHTS TO FUTURE CLAIMANTS, ESPECIALLY WHEN THERE ARE ALTERNATIVE MEANS OF ENCOURAGING SETTLEMENTS . . . . . 16

CONCLUSION . . . . . 20

## TABLE OF AUTHORITIES

**Cases:** **Page**

*Aetna Insurance Co. v. Kennedy*,
301 U.S. 389 (1937) . . . . . 10

*Barnes v. A. H. Robbins Co, Inc.*,
476 N.E.2d 84 (Ind. 1985) . . . . . 18

*Bowling v. Pfizer, Inc.*, 143 F.R.D. 141
(S.D. Ohio 1992), *appeal pending*,
No. 923973 (6th Cir.) . . . . . 19

## TABLE OF AUTHORITIES (cont.)

**Cases:** **Page**

*Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) . . . . . 16
*Brady v. United States*, 397 U.S. 742 (1970) . . . . . 10
*Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983) . . . . . 9
*Dante v. Dow Corning Corp.*, 143 F.R.D. 136 (S.D. Ohio 1992) . . . . . 10
*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) . . . . . 14
*Dincher v. Marlin Fire Arms Co.*, 198 F.2d 821 (2d Cir. 1952) . . . . . 18
*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) . . . . . 9
*Foster v. Bechtel Power Corp.*, 89 F.R.D. 624 (E.D. Ark. 1981) . . . . . 6
*Fuentes v. Shevin*, 407 U.S. 67 (1972) . . . . . 17
*Hansberry v. Lee*, 311 U.S. 32 (1940) . . . . . 11
*In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) . . . . . *passim*
*In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983) . . . . . *passim*
*In re Agent Orange*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd* 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) . . . . . 14
*In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 1985) . . . . 12
*In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) . . 19
*In re Forty-Eight Insulations, Inc.*, 58 B.R. 476 (Bankr. N.D. Ill. 1986) . . . . . 13
*In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) . . . . . 17

## TABLE OF AUTHORITIES (cont.)

**Cases:** **Page**

*In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984), aff'd, 52 B.R. 940 (S.D.N.Y. 1985) . . . . . 13
*In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990) . . . . 16
*In re UNR Indus.*, 29 B.R. 741 (N.D. Ill. 1983) . . . . . 10
*Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) . . 13
*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) . . . . . 9
*Overmann v. Syntex (USA), Inc.*, No. 852-02681 (Div. 5), Circuit Court, City of St. Louis, (Mo. July 10, 1991) . . . . . 15
*Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), *vacated on other grounds*, 100 F.R.D. 336 (D. Mass. 1983) . . . . . 10
*Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) . . . . . 18
*Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985) . . . *passim*
*Shults v. Champion Int'l Corp.*, 821 F. Supp. 517 (E.D. Tenn. 1992) . . . . . 6
*Ticor Title Insurance Co. v. Brown*, No. 92-1988 (pending) . . . . . 4
*Urie v. Thompson*, 337 U.S. 163 (1949) . . . . . 18
*Yandel v. PPG Indus. Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) . . . . . 5

**Constitutional Provisions, Statutes and Rules:**

Seventh Amendment . . . . . 17
Fourteenth Amendment . . . . . 17
Fed. R. Evid. 703 . . . . . 14
Fed. R. Civ. P. 23(b)(1) . . . . . 12
Fed. R. Civ. P. 23(b)(3) . . . . . *passim*

## TABLE OF AUTHORITIES (cont.)

**Miscellaneous:**

Note, *Abuse in Plaintiff Class Action Settlements: The Need for A Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308 (1985) . . . . . 11
Agent Orange Act of 1991, Public L. No. 102-4, 105 Stat. 11 (1991) . . . . . 3
Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980) . . . . . 17
Comment to the American Bar Association's Model Rule 1.7(b) on Ethics and Professional Responsibility, *ABA Committee on Ethics and Professional Responsibility*, Formal Op. 93-371 . . . . . 12
13B Arthur L. Frank, *Courtroom Medicine: Cancer* (1992) . . . . . 15
3 Louis R. Frumer and Melvin I. Friedman, *Products Liability* (1991) . . . . . 18
Han K. Kang, *et al., Dioxins and Dibenzofurans in Adipose Tissue of U.S. Vietnam Veterans and Controls* (1990) . . . . . 15
Manual for Complex Litigation, Second . . . . . 10
National Academy of Sciences Institute of Medicine, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (1993) . . . . . 15
Herbert B. Newberg and Alba Conte, Newberg on Class Actions (3rd. ed. 1992) . . . . . 10, 19

## STATEMENT OF INTEREST

*Amici* are 31 veterans service organizations, collectively representing more than 8,000,000 members.[1] *Amici* join together in this case in unprecedented solidarity to urge this Court to grant *certiorari* in order to review and ultimately undo the serious violations of the constitutional rights of Vietnam War veterans and their families addressed by the second Question Presented in the Petition.

This unique coalition has been inspired by the unstinting leadership of Admiral Elmo R. Zumwalt, Jr. (USN Ret.), who has previously served as Special Assistant to the Secretary of Veteran Affairs and as Chief of Naval Operations during the Vietnam War. In his role as chairman of ***Amicus Agent Orange Coordinating Council*** Admiral Zumwalt has provided a forum for many veterans service organizations to coordinate their interests in representing Vietnam veterans affected by Agent Orange.

Twenty-one *Amici* have been chartered by Congress to represent the interests of veterans of the Armed Forces and their families: (1) ***The American Legion*** (36 U.S.C. § 41), with 3.1 million members; (2) the ***Veterans of Foreign Wars of the United States*** (§ 111), with 2.2 million members; (3) the ***Disabled American Veterans*** (§ 90), with 1.2 million disabled members and 180,000 auxiliary members; (4) ***AMVETS*** (§ 67), with 200,000 members; (5) the ***Jewish War Veterans of the U.S.A.*** (§ 2701), with 100,000 members; (6) the ***Retired Enlisted Association*** (§ 5101), with 80,000 members; (7) the ***Vietnam Veterans of America*** (§ 3801), with 42,000 members; (8) the ***Marine Corps League*** (§ 57), with 37,000 members; (9) the ***Catholic War Veterans, USA, Inc.*** (§ 2601), with 35,000 members; (10) the ***American Ex-Prisoners of War*** (§ 2101), with 33,000 members; (11) the ***Blinded Veterans Association*** (§ 851), with 27,000 members; (12) the ***Military Order of the Purple Heart of the U.S.A., Inc.*** (§ 821), with 17,000 members; (13) the ***Army and Navy Union, U.S.A.*** (§ 3901), with 16,000 members; (14) the ***Polish Legion of American Veterans, U.S.A.*** (§ 2501), with 16,000 members; (15) the ***Paralyzed Veterans of***

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[1] Counsel for all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

***America*** (§ 1151), with 15,000 members; (16) the ***Regular Veterans Association of the United States*** (Pub. L. 74-844), with 15,000 members; (17) the ***Italian American War Veterans of the U.S.A.*** (36 U.S.C. § 1701), with 10,000 members; (18) the ***Women's Army Corps Veterans Association*** (§ 3101), with 5,000 members; (19) the ***American War Mothers*** (§ 91), with 1,500 members; (20) the ***Legion of Valor of the United States of America, Inc.*** (§ 631), with membership restricted to recipients of the Congressional Medal of Honor, Distinguished Service Cross, Navy Cross, or Air Force Cross; and (21) the ***Congressional Medal of Honor Society*** (§ 791), with membership restricted to recipients of the Congressional Medal of Honor.

*Amici* also include the following unchartered organizations: (1) ***The Retired Officers Association***, with 450,000 members; (2) the ***National Vietnam Veterans Coalition***, which is an umbrella organization composed of 75 organizations with an estimated total of 350,000 members; (3) the ***Fleet Reserve Association***, with 170,000 members; (4) ***The Veterans of the Vietnam War, Inc.***, with 10,000 members; (5) the ***National Association of Military Widows***, with 1,000 members; (6) the ***New Jersey Agent Orange Commission***; (7) the ***Oklahoma Agent Orange Foundation***; (8) the ***Agent Orange Data Base***; and (9) the ***Agent Orange Victims and Widows Support Network***.

The general purposes for which Congress has chartered many *Amici* include the following: "to uphold and defend the Constitution," 36 U.S.C. § 43, and promote "fidelity to its . . . laws," § 823(a); to "stimulate to the highest degree possible the interest of the entire Nation in the problems of veterans, their widows, and orphans," § 2603(c); to "assist disabled . . . veterans and other veterans in need of assistance and the dependents and survivors of such veterans," § 3803(6); "to foster love for the principles which they have supported by blood and valor," § 57(a); and to "encourage the doctrine of universal liberty, equal rights, and full justice to all," § 2703(5). In fulfilling these congressionally mandated obligations, chartered *Amici* are duty bound to protest the efforts of the courts below to give overreaching preclusive effect to the 1984 settlement of *In re "Agent Orange."* Far from providing "equal rights" to injured

Vietnam veterans, that settlement has systematically denied many Agent Orange-exposed Vietnam veterans, who manifested no injuries as of the date of the settlement, fundamental constitutionally derived rights which are routinely accorded to every other citizen of the United States injured by a defective product, including the right to receive notice, the right to opt-out, the right to have adequate legal representation, and ultimately the right to have grievances adjudged by a jury of one's peers. Far from providing "full justice," the cruel result of that settlement has been to restrict Vietnam veterans and their dependents to the receipt of nuisance value recoveries of approximately $3200 when they suffer total disability or when they die as a result of their exposure to products manufactured by respondents. Appendix to Petition ("A___"), A19, A39.

Amici do not idly request that this Court review and ultimately reverse this denial of access to justice effectuated by the courts below. Many *Amici*, especially The American Legion, have actively pursued scientific research or have assisted others in developing scientific information concerning the health effects on Vietnam veterans from their exposure to Agent Orange and dioxin. *Amici* have also petitioned Congress to authorize scientific studies regarding exposure to herbicides.[2] As the average 20-year latency period for certain causally related injuries, such as cancer, passes, these studies are now creating a body of evidence that leaves little doubt that Vietnam war veterans were injured by respondents' defective products in the process of serving our nation.

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[2] One result of these extensive efforts is that the Department of Veterans Affairs has recently acknowledged that certain debilitating illnesses were caused by exposure to herbicides in Vietnam. The district court in its decision applauds the federal government for making compensation available to veterans through the Department of Veterans Affairs pursuant to the Agent Orange Act of 1991, Public L. No. 102-4, 105 Stat. 11 (1991). A58-59. Although *Amici* also applaud this legislation, *Amici* point out that the American taxpayer is now paying for all of the expenses for the injuries caused by Agent Orange rather than respondents, who had greater responsibility for those injuries, but who have through this class action settlement so far managed to cap their expense.

Thus, *Amici*, especially those chartered by Congress, are compelled to request this Court to grant review in this case — particularly given the significance of the deprivation of due process rights when viewed from the perspective of the losses suffered by individual veterans and their families, such as Captain Donald Ivy and his widow, Shirley Ivy. The Second Circuit opined that the rights of individual veterans, including Captain and Mrs. Ivy, are outweighed by "society's interest in the efficient and fair resolution of large-scale litigation." A17. *Amici* believe that the quest for "efficient" claims administration can never provide sufficient justification for the wholesale abandonment of constitutionally protected rights. Moreover, the abridgment of rights here is not made in the context of typical, homogenized class action claims previously considered by this Court, involving the collection of relatively small sums of royalties, as in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), or disputes over fees charged by title insurers, as in *Ticor Title Insurance Co. v. Brown*, No. 92-1988 (pending). Rather, this case involves highly individualized claims which literally implicate matters of life and death.

## SUMMARY OF THE ARGUMENT

*Amici* respectfully submit that this Court should grant the petition for *certiorari*. The decisions below illustrate the grave dangers in any process that permits attorneys to negotiate a settlement on behalf of already injured plaintiffs by trading away the rights of absent, uninjured future claimants. In this case, core due process requirements, including the receipt of adequate notice, the opportunity to opt out, and the right to have adequate legal representation, were abandoned — an abandonment which was justified by the courts below for the inappropriate reasons of "efficiency" and "finality." A17, A35.

**I.** Future claimants, including the petitioners, were not provided with constitutionally adequate notice nor were they provided with a reasonable opportunity to opt out of the *In Re "Agent Orange"* settlement. Although the scope of the *Agent Orange* class was expanded upon settlement (and *after* certification) to include claimants, like Captain Ivy, who had not yet manifested

injury, no additional notice was given to new members of the class. And though the courts below were likely correct in stating that the effectiveness of notice to uninjured, potential future claimants was problematic, A17 (because such persons may not have attended to whatever notice was provided and, even if they did, they would have been forced to speculate upon the possibility of becoming ill in the future), the courts below were plainly incorrect in concluding that the difficulty of delivering such notice excuses the failure to deliver any notice whatsoever or justifies a presumption of the waiver of constitutionally protected liberty and property interests. Waivers of constitutionally protected rights cannot be valid unless they are knowingly and intelligently made.

**II.** Future claimants, again including the petitioners, were unrepresented during the *Agent Orange* settlement process. No subclasses were created, nor was a guardian appointed to safeguard the interests of future claimants. The courts below justified this utter lack of representation for absent future plaintiffs by citing the "unique circumstances" of the case. A21. However, this justification fails to take into account the very real divergent interests of present and future claimants, including different concerns about statutes of limitations, disparate interests in obtaining immediate financial recovery, and different capacities to await further scientific and medical developments which could clarify issues of causation.

**III.** The reiteration of notice, opt-out, and adequate representation requirements by this Court in the class action setting will give important guidance to lower courts throughout the country as they struggle with the problem of balancing the perceived need to encourage class action settlements against the basic obligation to protect the constitutional rights of individual class members. *Amici* submit that the courts below did not hold true to the balance that must be accorded these competing interests. Instead, the courts approved an unwarranted denial of the rights of American veterans — as well as plaintiffs in a wide range of circumstances — and sanctioned an extraordinarily broad use of federal judicial power. There are accepted mechanisms by which federal courts can preserve the rights to due process and trial by jury without imposing an unreasonable burden on the settlement of mass tort cases. The route taken by the courts below is not among them.

## ARGUMENT

*Amici* are well situated to advise this Court on the costs, both in legal and in human terms, posed by the Second Circuit's extraordinary disregard of due process rights. The decisions below create a threat to settled law, to constitutional values of due process, and to the welfare of thousands of severely ill veterans and their families. In this light, the questions which must be answered are whether, to what extent, and under what circumstances may named class action claimants and their attorneys extinguish or compromise the rights of "future" claimants, *i.e.*, persons whose injuries have not yet become manifest.

Indeed, the lower courts are divided over whether present claimants may ever extinguish in any manner the rights of future claimants. Contrary to the decision below, in *Shults v. Champion Int'l Corp.*, 821 F. Supp. 520 (E.D. Tenn. 1992), the court held: "No settlement that precludes future, unknown causes of action can be considered fair, reasonable, or in the best interests of the class as a whole." 821 F. Supp. at 524. The court explained that it would only "approve release language that barred . . . any class member's personal injury claim arising prior to the date the class was closed." 821 F. Supp. at 524. The court thus refused, without limitation, to approve a settlement that barred class members' personal injury claims arising *after* the class was closed.[3] *Amici* agree with that court. Certainly, any settlement purporting to extinguish the rights of future claimants should be gravely suspect and carefully reviewed.

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[3] Federal courts in Texas and Arkansas have reached similar conclusions. *See Yandel v. PPG Indus. Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974) (court denied certification of class under Fed.R.Civ.P. 23(b)(3) by employees of an asbestos plant, expressing concern that "because of the nature of the injuries claimed, there may be persons that might neglect to 'opt out' of the class, and then discover some years in the future that they have contracted asbestosis, lung cancer, or other pulmonary disease. These persons would be bound by decision rendered in this litigation."); *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624, 626-27 (E.D. Ark. 1981) (court held that present employees cannot represent future employees in discrimination suit: "To rule otherwise, . . . the court fears that the due process considerations which permeate the decision of whether or not to certify a class would be ignored.").

## I. FUTURE CLAIMANTS HAD NO NOTICE THAT THEIR CLAIMS WERE BEING EXTINGUISHED

This Court has held that in class actions seeking money damages, notice to absent claimants is required not only by Rule 23(b)(3), but also by due process. *Shutts, supra.* Yet, in the *In re "Agent Orange"* litigation, notice was never given to future claimants, in violation of their rights of due process. The extent of this deprivation is elucidated when related to the particular circumstances of Captain and Mrs. Ivy.

Captain Ivy served in the U.S. Marine Corps and was exposed to Agent Orange during his tour of duty in Vietnam from 1967 to 1968. After he returned from Vietnam, however, his exposure to Agent Orange became a distant memory. Thus, when in 1978 other Vietnam war veterans and their families first began to bring state law tort actions against the present respondents seeking monetary relief for injuries they believed were due to their Agent Orange exposure, A3, Captain Ivy, uninjured at that point, had no reason to pay attention to these claims. For the same reason, he remained unaware that these multiple state-law tort actions were consolidated into a single action known as *In re "Agent Orange" Product Liability Litigation*. A3, A68.

Because Captain Ivy had filed no lawsuit, had consulted with no attorney, and had never contacted the Veterans Administration regarding his exposure to Agent Orange in Vietnam, he had no way of knowing that on December 16, 1983, the district court would certify a Rule 23(b)(3) class with opt-out rights. A3-A4. Nor was Captain Ivy himself subsequently notified of the existence of the class, which was specifically defined to include:

> "*[T]hose persons who were* in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were *injured* while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . ."

A34-A35; 100 F.R.D. 718, 729 (E.D.N.Y. 1983) (emphasis added). In 1983, Captain Ivy, of course, did not believe that he had been "injured" by Agent Orange — nor could he reasonably have had such a belief — for the simple reason that as of that time he had no injuries. *See* A68-A69 (Affidavit of Shirley Ivy).

Thus, Captain Ivy neither knew nor could he have known that the deadline for opting out of this Rule 23(b)(3) class was May 1, 1984; and he was completely unaware that six days later, on May 7, 1984, the named plaintiffs and their attorneys would settle these cases for what the Second Circuit has characterized as "nuisance value," 818 F.2d at 171. Most importantly, Captain Ivy was wholly unaware that the settling parties would, after class certification, unilaterally change the definition of the class, thereby substantially extending its breadth by agreement: "*The Class specifically includes persons* [including, apparently, Captain Ivy] *who have not yet manifested injury*." 597 F. Supp. 740, 865 (E.D.N.Y. 1984) (settlement agreement), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (emphasis added). Nor was he aware that despite this modification, which substantially broadened the scope of the class, the district court would fail to direct that a second notice be distributed to currently uninjured veterans who were now covered by this broadened class definition.

Of course, this was not an issue which concerned Captain Ivy in 1984. It only became a concern to him in 1987 when, in his forties, he was diagnosed with cancer. It was at this time, while investigating the cause of his own cancer, that he realized its connection to Agent Orange, and first learned of the existence of the earlier *Agent Orange* class action litigation. A69. It was only then, in the context of preparing a state law tort action, that Captain and Mrs. Ivy were informed that the case they had not yet brought had already been settled for "nuisance value" of approximately $3,200 -- settled, that is, without anyone ever contacting them and without their ever being allowed to contact an attorney or to have one appointed to represent their interests. A19, A39, A69.

Shockingly, the Second Circuit could only offer a rather ominous justification for this abrogation of the due process rights of Captain and Mrs. Ivy (at A17):

> "[S]ociety's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. . . . [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good."

In contrast to the Second Circuit's cavalier approach to due process rights, this Court has been unwilling to countenance such abridgements of the constitutional rights of individuals. This Court has previously held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). In a class action for money damages, rights to receive notice and the subsequent ability to opt out of the class cannot be abridged: "[W]e hold that due process requires *at a minimum* that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts, supra*, at 812 (emphasis added).[4]

Finally, what is most astonishing and most disturbing is the Second Circuit's willingness to countenance this abridgement of due process rights on the notion that "[p]roviding individual notice and opt-out rights to persons who are unaware of an injury would do

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[4] Few activities are subject to more extensive record keeping than military service; if the rights of future claimants can be abolished in this context without individualized notice, then the implications of the Second Circuit's decision are unlimited. By contrast, in an early decision regarding Rule 23 requirements, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), this Court demonstrated the full extent to which the rights of individual class members must be safeguarded. *Eisen* raised the issue of adequate notice in a Rule 23(b)(3) antitrust and securities class action with millions of members and a class representative with only a $70 stake. Despite the relatively small size of the individual claims, this Court held that the class action could proceed only with individual notice to more than two million class members whose names and addresses could be identified with reasonable effort, holding that "[i]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." Significantly, the Court in *Eisen* stated that such notice was required so that each individual class member "may request exclusion from the action and thereby preserve his opportunity to press his claim separately. . . ." *Id.* at 176. *See also Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351 (1983) ("*Eisen's* notice requirement was intended to inform the class member that he could 'preserve his opportunity to press his claim *separately*' by opting out of the class." (emphasis in original)).

little good."[5] The Second Circuit may well have been correct: individuals with no present injuries are not in a position to make intelligent decisions regarding the waiver of their rights.[6] However, it is inexcusable that the Second Circuit should respond to this problem by authorizing a judicial presumption of the waiver of constitutional rights instead of increasing the vigilance with which those rights are protected. A judicially countenanced presumption of waiver is directly contrary to numerous decisions of this Court. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (the waiver of constitutional rights "must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences."); *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver").

## II. FUTURE CLAIMANTS DID NOT RECEIVE ADEQUATE REPRESENTATION DURING THE SETTLEMENT PROCESS

Settlement classes, in any setting, present serious potential for abuse. *See, e.g.*, Manual for Complex Litigation, Second § 30.41,

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[5] Other courts have not been as willing as the Second Circuit to abridge the notice and opt out rights of absent future claimants. *See, e.g., Dante v. Dow Corning Corp.*, 143 F.R.D. 136 (S.D. Ohio 1992) (requiring individual notice by first-class mail to all potential future breast implant claimants); *Payton v. Abbott Labs*, 83 F.R.D. 382, 393 (D. Mass. 1979) (refusing to bind women whose mothers had ingested the drug DES unless personal notice was sent to every member, regardless of whether they had manifested injuries) (order vacated on other grounds, *Payton v. Abbott Labs*, 100 F.R.D. 336 (D.Mass. 1983)); *In re UNR Indus.*, 29 B.R. 741, 747 (N.D. Ill. 1983) ("[I]t is inconceivable that any notice short of personal notice to every person whom the debtors would seek to bind — and this could include, theoretically, every person in this country — would be acceptable under the principles of due process.")

[6] As stated by leading scholars in the field of class actions: "For class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right within a court-designated period of time . . . is of no beneficial use." 1 Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, § 1.23 (3rd. ed. 1992).

at 236 (1985) ("As a practical matter, the dynamics of class action settlement may lead the negotiating parties — even those with the best of intentions — to regard the interests of the class members too lightly."). Indeed, all participants in class action settlement negotiations have extraordinary incentives to settle. From the perspective of defendants, settlement is an opportunity to cap risk. From the perspective of the courts, settlement may be an opportunity to clear court calendars of tens of thousands of cases. And, not least of all, from the perspective of class counsel, the economic rewards of settlement sooner rather than later can be extraordinarily enticing — regardless of the inchoate needs of absent class members or future claimants.

For these reasons, adequate representation of absent claimants has become one of the cornerstones of due process guarantees in class actions, requiring, among other things, that class representatives and their counsel are aligned identically with the interests of absent class members. As this Court emphasized in *Hansberry v. Lee*, 311 U.S. 32, 45 (1940):

> [S]election of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

In the present instance, however, the class as originally certified was not defined to include those veterans who had not yet manifested injury, and, as such, by definition the counsel for the class as originally certified did not represent claimants whose interests were "the same" as those of Captain and Mrs. Ivy.[7]

Indeed, the district court and the Second Circuit acknowledged the dangers that could be posed in the absence of separate representation for potential future claimants like Captain Ivy. A58. As the Second Circuit noted, "'[m]any genuine conflicts of interest . . . [can exist] in a situation such as this'" when there is no represented sub-class to decide whether to extinguish the unaccrued

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[7] *See* Note, *Abuse in Plaintiff Class Action Settlements: The Need for A Guardian During Pretrial Settlement Negotiations*," 84 MICH. L. REV. 308 (1985).

future claims of absent plaintiffs who have not yet suffered injury. A17 (quoting the district court). Nevertheless, no class representative was ever designated for Captain or Mrs. Ivy or for any other absent future claimant, nor were the future claimants represented by a separate attorney, trustee, or guardian. 996 F.2d at 1437; A18, A21.

Recognizing that future claimants received no separate representation, both the district court and the Second Circuit excused this admitted failure to accord Captain Ivy his rights to counsel, holding that constitutional rights of due process may be extinguished when a court makes a *post hoc* determination that no harm was caused by the abrogation of the right. Thus, both courts dismissed the requirement of separate counsel with the assertion that harm from any conflict had "never materialized," because all veterans would become eligible for identical "nuisance value" payments from the Fund. (Neither the district court nor the Second Circuit mentioned the fact that pursuant to the terms of the settlement the vast majority of veterans, *i.e.* those with injuries causing less than total disability or death, would not be entitled to receive any recovery at all. A18.) However, the applicable test of a conflict of interest is not to judge it on a *post hoc* basis, but rather to examine whether at the time of settlement there was a potential for conflict between the present injury and the future injury classes.[8] Clearly, such potential for conflict did exist. Nevertheless, the Second Circuit concluded from its own factual review that "[t]he unique circumstances" of this case rendered separate class counsel "unnecessary." A21.[9]

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[8] The Comment to the American Bar Association's Model Rule 1.7(b) on Ethics and Professional Responsibility states that "[a]n impermissible conflict may exist by reason of . . . the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." Cited by *ABA Committee on Ethics and Professional Responsibility*, Formal Op. 93-371, at 6.

[9] Unlike here, in bankruptcy, as well as in limited fund class actions under Rule 23(b)(1), it is at times necessary to account for future claims in order to preserve a portion of insufficient assets to cover future liabilities that have not matured. Yet, even in the few cases in this setting that have recognized future claimants, in light of the inescapable conflicts that may arise, the courts have typically segregated future claimants from present claimants into separate sub-classes with separate counsel. *See In re Amatex Corp.*, 755

Notwithstanding the inherent deficiencies in the Second Circuit's willingness to abandon constitutionally required due process rights subject to its own *post hoc* determination, both the Second Circuit and the district court were in error when they stated that a conflict had "never materialized" because future claimants and current claimants were treated identically. First, they were not treated identically. Those claimants who had present injuries which the claimants subjectively believed were related to their exposure to Agent Orange had the ability to judge the merits of their claim and reasonably decide whether to opt out of the class. On the other hand, Captain Ivy, who had not yet manifested any injuries, received no notice of the class and, in any case, could not intelligently evaluate the prospects of litigating the case to redress his injuries, because his injuries had not yet manifested.[10]

In addition, benefits were conveyed to present claimants that were not equally conveyed to Captain Ivy. First, many present claimants benefitted from the fact that class actions toll statutes of limitations. Thus, those present claimants who had suffered injuries much earlier were able to take advantage of participation in the settlement and avert a possible defense by respondents on the basis of the lapse of applicable statutes of limitations. Captain Ivy, however, had no incentive to compromise his claim to gain any such benefits, because his Texas statute of limitations did not begin to run until the time his injury was diagnosed, and Mrs. Ivy's statute did not begin to run until her husband's death.

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F.2d 1034, 1042-43 (3d Cir. 1985) ("[N]one of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants, and therefore future claimants require their own spokesperson."); *In re Forty-Eight Insulations, Inc.*, 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986); *In re Johns-Manville Corp.*, 36 B.R. 743, 749, 752 (Bankr. S.D.N.Y. 1984), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985).

[10] In 1984, Captain Ivy's claim was not even justiciable. In *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2139 (1992), this Court has established an "irreducible constitutional minimum of standing" which requires that "the plaintiff must have suffered an 'injury in fact' — an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 2136 (citation omitted). In the absence of unbounded clairvoyance, the risk of Captain Ivy's developing an Agent Orange related cancer at some indefinite time in the future was, by definition, a speculative or conjectural injury rather than a current or imminent "injury in fact" as necessitated by *Lujan*.

Second, presently injured claimants had a rational incentive to seek an immediate, albeit less adequate, settlement, because their illnesses caused financial pressures, including the present costs of treatment. These costs were clearly defined. By contrast, Captain Ivy did not experience the same financial pressures nor did he have, in 1984, any knowledge of the potential costs of his future treatment and disabilities.

Third, unlike Captain Ivy, presently injured claimants were obligated by claims accrual rules of various jurisdictions to file their actions in a timely fashion. These suits were filed at a time when evidence of medical causation was only in the nascent stages of development. The district court recognized that it was "of course, possible that in a few years a sudden increase in diseases associated with Agent Orange will be revealed."[11] 597 F. Supp. at 795. This acknowledgement came in part because of the fact that when the *Agent Orange* cases were initially filed in 1978, at maximum claimants were only sixteen years post-exposure and at minimum six years. By contrast, mean cancer latency for environmental toxins is often in excess of twenty years. *See* Affidavit of Dr. Jenkins, 2d Cir. Appendix, No. 92-7575, at 133-34. And, as the district court noted, "[i]t took almost forty years for solid tissue cancers to develop in victims of atomic bombing in Japan." 597 F. Supp. at 795. For these reasons, if independent counsel had been appointed for Captain Ivy, that counsel could have asserted that it would be unreasonable for Captain Ivy to accept a "nuisance value" settlement

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[11] The District Court went on to find that for the purpose of the opt-out claims before it, "[i]t appears unlikely that such proof will develop in time to affect th[at] litigation." 597 F. Supp. at 795. The district court then dismissed the claims of those persons who had exercised their opt-out rights. 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The grounds for dismissal were that the then-available scientific evidence was insufficient to demonstrate a causal link between Agent Orange exposure and plaintiffs' illnesses, and that the "government contractor defense" preempted state tort law. Only the latter ground was upheld on appeal, as the Second Circuit concluded that the district court's ruling was inconsistent with the law applied in the Second Circuit on the admissibility of expert testimony under the Federal Rules of Evidence, Rule 703. 818 F.2d at 189. This would remain true today under this Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2797-98 (1993).

when his ability to substantiate medical causation (if he became ill from Agent Orange) would very likely improve with time.

In fact, despite the Second Circuit's protestations to the contrary, which are based upon material *dehors* the record,[12] scientific knowledge, obtained since the date of the settlement, has, as expected, strengthened claims that respondents' products were responsible for the occurrence of cancer in American war veterans. *See, e.g.*, Affidavit of Dr. Jenkins, 2d Cir. Appendix, No. 92-7575, at 129. Indeed, in 1991 Congress directed the Secretary of Veterans Affairs under Public Law 102-4 to "conduct a comprehensive review and evaluation of the available scientific and medical information regarding the health effects of exposure to Agent Orange." Pursuant to that charge, the National Academy of Sciences' Institute of Medicine Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides reported in August 1993 that there was sufficient evidence to conclude that there is a positive association between herbicide exposure in Vietnam and three classes of cancer (soft tissue sarcoma, Non-Hodgkin's lymphoma, and Hodgkin's disease) and that there was suggestive evidence of an association with three other classes of cancers (respiratory cancers, prostate cancer, and multiple myeloma). National Academy of Sciences Institute of Medicine, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (1993) (Attachment to July 28, 1993 letter of Robert Hager to Clerk of the United States Court of Appeals for the Second Circuit).[13]

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[12] A20. While not mentioning petitioners' substantial record evidence, the Second Circuit went outside the record and cited both Han K. Kang, *et al.*, *Dioxins and Dibenzofurans in Adipose Tissue of U.S. Vietnam Veterans and Controls* (1990) and 13B Arthur L. Frank, *Courtroom Medicine: Cancer*, § 25A.00, at 25A-4 (1992), quoting from Frank as follows: "'[F]urthermore, no deaths attributable solely to exposure to Agent Orange and its dioxin contaminant have been reported.'" A20. However, the danger of such an *ex parte* evidentiary process is that a court risks the possibility of basing its decision on inaccurate information. Petitioners cited below, Brief for Shirley Ivy at 47, a case (tried by counsel of record for *Amici*) wherein the family of a worker exposed to dioxin received a $1.5 million verdict for his death due to soft tissue sarcoma. *Overmann v. Syntex (USA), Inc.*, No. 852-02681 (Div. 5), Circuit Court, City of St. Louis (Mo. July 10, 1991).

[13] To date, the Department of Veterans Affairs has announced regulations to compensate herbicide-exposed Vietnam War veterans for each of the above cancers, with the exception of prostate cancer.

Lastly, the district court itself recognized that "[f]uture claimants might . . . disagree with prior litigation strategy or find new evidence in support of their claims." A57. As it has turned out, one of the most difficult impediments to recovery for Vietnam war veterans in 1984 was the district court's perception of the expansive nature of the immunity given to defense contractors. Recently, the Second Circuit, by Chief Judge Oakes, has held that the district court's rulings herein regarding this defense did not survive this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which established a far narrower contractor defense than that applied by the district court. *See Joint Eastern and Southern District of New York Asbestos Litigation*, 897 F.2d 626, 634-35 & n.8 (2d Cir. 1990).[14]

## III. PURPORTED JUDICIAL EFFICIENCY CAN NEVER JUSTIFY THE WHOLESALE DENIAL OF DUE PROCESS RIGHTS TO FUTURE CLAIMANTS, ESPECIALLY WHEN THERE ARE ALTERNATIVE MEANS OF ENCOURAGING SETTLEMENTS

In addition to countenancing the abolition of due process rights for future claimants, the decisions below presage a remarkable expansion of federal judicial power. The district court's justification for upholding the parties' contractual agreement to extinguish the rights of Captain Ivy was that the parties at the table were "[c]oncerned with the potential for new actions and recogniz[ed] the need for finality." A35. Concerned "that class action settlements simply will not occur" if they are made "too difficult" by according future claimants due process rights, the district court held that Captain Ivy's potential future claims in 1984 were outweighed by the "interests of presently injured plaintiffs as well as defendants in achieving a settlement." A58. The Second Circuit concurred that the deprivation of Captain Ivy's constitutional rights was justified by

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[14] *Boyle*, as applied to the facts here, would require that a jury, and not a judge, decide the issue of whether the government ordered its herbicide to be contaminated with deadly dioxin (which the government clearly did not do), and also decide whether the other elements of the defense were satisfied. *See Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d at 635 n.8; *Boyle*, 487 U.S. at 512, 514.

"society's interest in the efficient and fair resolution of large-scale litigation." A17.

However, fundamental constitutional principles can never be disregarded, especially for the sake of supposed efficiency. As this Court has stated:

> Procedural due process is not intended to promote efficiency . . . it is intended to protect the particular interests of the person whose possessions are about to be taken. . . . "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

*Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).[15]

The Second Circuit's decision defies the history and very purposes of the Seventh and Fourteenth Amendments. The right to jury trial, as an essential civil right, was intended to safeguard against the type of supervisory dominion by the judiciary that the Second Circuit now advocates.[16] As the Chief Justice has stated:

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[15] *See also In re: General Motors Corp. Engine Interchange Litigation*, 594 F. 2d 1106, 1133 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979), wherein the Seventh Circuit disagrees with the Second Circuit's decision herein, stating that "convenience and expediency cannot justify disregard of the individual rights of even a fraction of the class."

[16] *See, e.g.*, Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 832-35 (1980).

> The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence. . . . The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

*Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 338, 343 (1979) (Rehnquist, J., dissenting).

Additionally, the Second Circuit has disregarded the very significant state interest in preserving the right of persons, like Captain and Mrs. Ivy, to bring suit subsequent to the manifestation of injury or the occurrence of death. Pursuant to the "discovery rule," virtually every jurisdiction in the United States has authorized a tolling of the statute of limitations until an injured person knows or should know of his or her injury.[17] As stated in Judge Frank's oft-quoted dissent:

> Except in a topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to a plaintiff.

*Dincher v. Marlin Fire Arms Co.*, 198 F.2d 821, 823 (2d Cir. 1952). Yet, while virtually every jurisdiction has by now heeded these words, the Second Circuit would seem to add the paradoxical exception that an individual's claim can be settled *by others* before his or her cause of action exists.

It is clear then that the lower courts' preference for "efficiency" and "finality" cannot possibly justify their denial of the

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[17] *Urie v. Thompson*, 337 U.S. 163 (1949). *See also Barnes v. A.H. Robbins Co., Inc.* 476 N.E. 2d 84 (Ind. 1985) (collecting decisions) and 3 Louis R. Frumer and Melvin I. Friedman, *Products Liability* § 26.04 (1992) (collecting decisions applying discovery rule).

constitutional rights of future claimants. Even the presumption of the courts below that "class action settlements will simply not occur," A58, unless the rights of future claimants are ignored, is wrong. For instance, in the case of *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 166 (S.D. Ohio 1992), *appeal pending*, No. 923973 (6th Cir.), a district judge, faced with a desire of the respective parties to extinguish future rights, approved a settlement that compromised the rights of unknown future claimants in a class action involving convex/concave heart valves *only* on the condition that any class member who ultimately did suffer a fractured heart valve would be permitted *at that time* to opt out of the class, to arbitrate, or to accept payment under the terms of the settlement. There is no reason that a similar settlement could not have been approved by the courts herein.[18]

In the *In re Agent Orange* litigation, the thrust of the settlement could still have been preserved by ruling that notice was effective only as to those persons who had manifested Agent Orange-related injuries at the time of the settlement. On the other hand, those, like Captain and Mrs. Ivy, who subsequently manifested their injuries should have been given an opportunity to be informed of their right to pursue their cause of action in a civil jury trial and should have been afforded a reasonable period of time in which to exercise that right after the manifestation of their injuries.

Settlements, even for future claimants with *future opt out rights*, when predicated upon realistic evaluations of the prospective

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[18] Indeed, respondents are seeking a result by way of settlement that they could not have achieved through trial. Due process does not permit a class action judgment to bind absent class members with respect to particularized damage issues. Personalized damage and causation issues require individual trials. *See In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (reversing trial court's decision to adjudicate individual damages claims through statistical extrapolation from representative plaintiffs). *See, e.g.*, 3 Herbert B. Newberg and Alba Conte Newberg, *supra* note 6, § 17.39 ("Anytime a mass tort gives rise to injuries that occur over a period of time . . . inevitably there will be claims that arise in the future after an action for this mass tort has been permitted to be maintained and adjudicated as a class action. Those future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples.")

success of claims, will likely be favored by claimants in that they avoid significant transaction costs for both sides. However, when such settlements are unreasonable, it will then be more likely that future claimants will opt out and return to the civil justice system. Applied to the *Agent Orange* settlement herein, if future claimants truly face the dim prospect of success that is envisioned by the Second Circuit (A21) and respondents, then respondents need not fear that many veterans will opt for a return to the civil justice system. Nevertheless, fundamental constitutional rights are no less precious to veterans of our Armed Forces than they are to every other American, and it would be a travesty of justice if Vietnam veterans were not given at least the opportunity for a jury trial that is generally accorded to all other victims by our system of laws.

## CONCLUSION

The courts below, in the putative interest of judicial efficiency and contrary to the dictates of due process, have fashioned a broad and far-reaching doctrine which caused Captain Ivy to be bound to the 1984 settlement and to have his rights extinguished without notice, without an opportunity to opt out, and without adequate representation. This purported solution was fashioned as if Congress had delegated to these two courts a broad power to create public policy concerning the compensation for all Vietnam veterans to the exclusion of every other state and federal court in the country. *Amici* do not believe that the courts below were vested with such plenary power and, therefore, *Amici* request that this Court grant *certiorari* in order to review and ultimately reverse this usurpation of legislative and judicial powers by the courts below.

Respectfully submitted,

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